(8)

Supreme Court, U.S.
FILED
SEP 11 1997
CLERK

No. 96-1824

In the
Supreme Court of the United States
October Term, 1996

GARY LEE, M.D., individually and on behalf of his terminally ill patients; WILLIAM PETTY, M.D., individually and on behalf of his terminally ill patients; JANICE ELSNER, individually and as representative of a class of terminally ill patients; et al.,

Petitioners,

v.

F. DOUGLASS HARCLEROAD, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY TO RESPONSES TO MOTION TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

Thomas Alderman
132 E. Broadway, Suite 400
Eugene, OR 97401
Telephone 541/484-0176
Counsel for Petitioners

Filed: September 12, 1997

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BOPP, COLESON & BOSTROM
2 Foulkes Sq., 401 Ohio St.
P.O. Box 8100
Terre Haute, IN 47808-8100
Telephone: 812/232-2434
Counsel for Petitioners

31pp

LIST OF CORPORATIONS

The Willows Home, Inc. has no parent company and no subsidiaries.

The parent company of Maryville Nursing Home, Inc. is Sisters of St. Mary of Oregon, an Oregon nonprofit religious corporation. Maryville Nursing Home, Inc. has no subsidiaries.

TABLE OF CONTENTS

Page

List of Corporations i

Table of Contents ii

Table of Authorities iii

Reply in Support of Motion to Defer 1

I. Deferral of consideration of the *Petition* would not provide political advantage to proponents or opponents of repeal. 1

II. Prudential considerations support maintaining the status quo by deferring a decision pending prompt political resolution of this matter. 4

Conclusion 7

TABLE OF AUTHORITIES

Page

CASES

Hamilton v. Meyers, Nos. S44434, S44454 (Or. Sup. Ct. Sep. 2, 1997) 5

Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995) 2

United States v. Carver, 260 U.S. 482 (1923) 2

Washington v. Glucksberg, 117 S. Ct. 2258 (1997) 2, 6

CONSTITUTIONS, STATUTES & RULES

Enrolled Oregon House Bill 2954 4

Or. Rev. Stat. § 250.005 5

Or. Rev. Stat. § 250.075(1) 4

Or. Rev. Stat. § 250.075(2) 4

Or. Rev. Stat. § 250.085 4

Or. Rev. Stat. § 250.355 5

Supreme Court Rule 21.4 1

OTHER AUTHORITIES

Oregon Secretary of State, Timelines for the November 4, 1997 Special Election by Mail 5

Reply to Briefs in Opposition 2

REPLY IN SUPPORT OF MOTION TO DEFER

On June 23, 1997, Petitioners filed their *Motion to Defer Consideration of Petition for a Writ Of Certiorari* with this Court. The Motion was occasioned by the Oregon Legislative Assembly's passage of a statute that places Oregon Ballot Measure 16 — the law challenged by the Petitioners — before Oregon voters for possible repeal by referendum on November 4, 1997. Petitioners argued that this Court should defer consideration of their *Petition* until after the November referendum because of an imminent future event that might render the *Petition* moot.

No response to Petitioners' *Motion to Defer Consideration* was filed by any of the Respondents within ten days of the motion, i.e., by July 3, 1997, as required by Supreme Court Rule 21.4. Therefore, Respondents have waived the right to object to the *Motion to Defer Consideration*, and no arguments by Respondents against the *Motion to Defer Consideration* should be considered in deciding Petitioners' *Motion to Defer Consideration*.

Both Respondent State of Oregon and Respondents Levin and Shuck commented on the *Motion to Defer Consideration* in their briefs in opposition to the *Petition*. *Or. Br.* at 23 & n.13; *Levin Br.* at 4. These comments were in the nature of an untimely response to the *Motion to Defer Consideration*, and Petitioners Janice Elsner et al. hereby reply in order to: 1) object to the comments and 2) rebut them, in the event this Court considers them.

I. Deferral of consideration of the *Petition* would not provide political advantage to proponents or opponents of repeal.

Oregon asserts that "[d]elaying a ruling on the petition until after the November 4, 1997, referral may provide plaintiffs and other opponents of Measure 16 with a political

advantage in the form of on-going uncertainty about the constitutionality of the law." *Or. Br.* at 23 n. 13.[1] (The State does note that the Petitioners "properly do not rely on that as a basis to urge the Court to delay a ruling on the petition, however." *Id.*) Oregon's claim is erroneous for two reasons.

First, even if this Court denies the *Petition*, the substance of Petitioners' constitutional claims against Measure 16 will remain intact and potentially justiciable.[2] Moreover, the district court opinion in *Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995), holding Measure 16 unconstitutional on equal protection grounds, will not have been reversed on the merits of the Petitioners' underlying constitutional claims. *See, e.g., United States v. Carver*, 260 U.S. 482, 490 (1923) ("denial of a writ of certiorari imports no expression upon the merits of the case"). Thus, "on-going uncertainty about the constitutionality of the law" will continue to exist even if this Court denies certiorari, as the Respondents argue that it should.

Similarly, if certiorari should be granted, then the present uncertainty will continue unabated.

Since the uncertainty over the constitutionality of Measure 16 would not be resolved by immediate consideration of the *Petition*, whatever the outcome, Oregon's argument against deferral in order to dispel constitutional uncertainty makes no sense.

---

[1]Oregon also argues that deferral would serve no purpose because the "petition does not present the Court with a legal question of importance." *Or. Br.* at 23. This claim is fully answered in Petitioners' *Reply to Briefs in Opposition* filed with this Court on September 12, 1997, and need not be addressed here.

[2]This Court retained scrupulous neutrality as to the constitutionality of Measure 16 when discussing the present case in *Washington v. Glucksberg*. 117 S. Ct. 2258, 2262 n.7, 2266 & n. 14 (1997).

Second, Oregon simply presumes that political proponents of repeal are served by continuing "constitutional uncertainty" that prevents Measure 16 from taking effect. It might just as easily be the case, however, that Oregon voters would be *more* inclined to reject Measure 16 if the law took effect and assisted suicides actually began to be performed under its auspices.

In any event, Oregon's presumption underscores the essentially political nature of the decision that this Court would be required to make based on the Oregon's argument: Oregon asks the Court not to defer consideration of the *Petition* based purely on an estimate of how the voters may react to maintaining the status quo. In contrast, Petitioners Elsner et al. maintain that deferral is appropriate for jurisprudential reasons relating to judicial economy and potential mootness. *Motion to Defer Consideration* at 2-3 (and cases and authority there cited).

The brief in opposition to the *Petition* by Goodwin, Coombs Lee, and Sinnard makes no mention of the *Motion to Defer Consideration*, and these Intervenor Respondents have not responded and now cannot respond to Petitioners' *Motion to Defer Consideration*. Supreme Court Rule 21.4. Respondents Goodwin, Coombs Lee, and Sinnard are the three chief petitioners who originally sponsored Measure 16 in 1994. Presumably, they would be most disturbed by any political advantage that deferral might gain for the proponents of Measure 16 repeal, yet they have neither argued that deferral would shift the political balance nor even filed a response to the *Motion to Defer Consideration*.

Intervenor Respondents Levin and Shuck are or represent persons unable to secure assisted suicide as the result of this court action. Yet they did not file a response to the

Motion to Defer Consideration. In their *Brief in Opposition* they do note that Oregonians might soon "lose interest" in this challenge "because the law itself may go away or change form in the near future" by virtue of the referendum or legislative amendment, and they ask for no delay "until after the November plebiscite." *Levin Br.* at 2-4. However, Petitioners Elsner et al. argue for deferral precisely *because of* the mootness that Respondents Levin and Shuck suggest is imminent.

II. Prudential considerations support maintaining the status quo by deferring a decision pending prompt political resolution of this matter.

Deferral would serve the interest of judicial economy by postponing a decision which may not need to be made. This Court's valuable resources ought not to be expended on a matter that may be moot in such a short amount of time, especially when all that is required is a brief postponement of the usual conferencing time for the *Petition*.

Moreover, any decision to accept or refuse the Petition would now take place squarely in the midst of the legal process begun after the Oregon Legislative Assembly voted to submit Measure 16 to Oregon voters to repeal or retain by referendum. After the Assembly enacted Enrolled Oregon House Bill 2954, which referred Measure 16 to the voters (*Motion to Defer Consideration of Petition for a Writ of Certiorari, Exhibit A*), the Assembly prepared a ballot title pursuant to Or. Rev. Stat. § 250.075(1) (1995). The ballot title was vetoed by the Governor, and the Attorney General prepared a ballot title pursuant to Or. Rev. Stat. § 250.075(2).

Several electors disputed the process and language of the ballot title and submitted the matter to the Oregon Supreme Court pursuant to Or. Rev. Stat. § 250.085. The Court issued

a final opinion on the language of the ballot title on September 2, 1997. *See Hamilton v. Meyers*, Nos. S44434, S44454 (Or. Sup. Ct. Sep. 2, 1997), attached hereto as *Exhibit A*.

This referendum is being conducted by mail and, in accord with the extensive procedures required under Oregon law for initiatives and referenda (Or. Rev. Stat. § 250.005 to § 250.355 (1995)), the entire process for conducting a referendum is now well under way. *See Timelines for the November 4, 1997 Special Election by Mail*, issued by the Oregon Secretary of State, attached hereto as *Exhibit B*.

Thus, the Secretary of State certified the official ballot to county election officials on September 9, 1997. *Id.* at (q). Mail ballots will be sent to long-term absentee voters by September 20, 1997. *Id.* at (r). An explanatory pamphlet (which includes the language of the ballot title, an official explanatory statement, the statute authorizing the referendum, and pro/con arguments submitted by proponents and opponents of repeal) must be "delivered to [Oregon] households not sooner than October 8, 1997, and not later than October 11, 1997." *Id.* at (s). Ballots must be mailed to non-absentee voters "not sooner than October 15, 1997 and not later than October 17, 1997." *Id.* at (t). All ballots must be returned by voters to the State by no later than 8:00 p.m. on Tuesday, November 4, 1997, to be counted as valid. Ballots may be returned by mail or in drop-boxes provided in some locations.

Obviously, the political debate that attends this legal process is also well underway. The campaigns for and against retention of Measure 16 must parallel and be based, at least in part, upon the legal milieu created by the nature of the language of the ballot title, the nature of the explanatory pamphlet being provided to the voters, and the present status of this litigation.

For this Court to rule either to grant or deny the Petition at this time would in effect introduce an unknown, potentially unsettling factor into on-going legal and political processes that will be over in less than two months. Prudential considerations arising from appropriate judicial deference to legislative and political aspects of governance and from federal-state comity suggest that the status quo should be maintained by deferring consideration of this Petition until the referendum has been conducted.[3] If the states are the laboratories of democracy, then the federal judiciary ought to at least wait to test the outcome of an experiment until it had been completed.

In its recent opinions rejecting a constitutional right to assisted suicide, this Court left the matter with the States to resolve (in a constitutionally permissible manner, of course). *See, e.g., Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997). As Oregon engages in the struggles which characterize representative and democratic lawmaking, the most neutral position this Court could take would be to remain above the fray by simply permitting the status quo to continue while the Nation watches to see if Oregon really wants legalized assisted suicide after all.

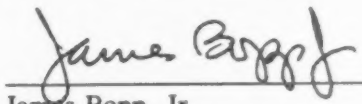
---

[3]Historically, the status quo in Oregon has been that assisted suicide is illegal for all. Because Measure 16's implementation has remained enjoined by federal court order for nearly three years, the status quo has remained that assisted suicide is illegal for all in Oregon.

CONCLUSION

For the foregoing reasons, the Court should grant the *Motion to Defer Consideration of Petition for a Writ of Certiorari* and defer conferencing the present case until after the results of the November 4, 1997, referendum are certified and the Court is notified by the Petitioners of the results.

Respectfully submitted,



James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BOPP, COLESON & BOSTROM
2 Foulkes Sq., 401 Ohio St.
P.O. Box 8100
Terre Haute, IN 47808-8100
Telephone 812/232-2434
Counsel for Petitioners

Thomas Alderman
132 E. Broadway, Suite 400
Eugene, OR 97401
Telephone 541/484-0176
Counsel for Petitioners

Filed: September 12, 1997

Filed: September 2, 1997

IN THE SUPREME COURT OF THE STATE OF OREGON

N. GREGORY HAMILTON, M.D., KENNETH STEVENS, M.D., SPEAKER LYNN LUNDQUIST, REP. LYNN SNODGRASS, and REP. RON SUNSERI,

Petitioners,

v.

HARDY MYERS, Attorney General, State of Oregon

Respondent.

PETER GOODWIN, M.D., BARBARA COOMBS LEE, ESQ., and ELVEN SINNARD,

Petitioners,

v.

HARDY MYERS, Attorney General for the State of Oregon,

Respondent.

(SC S44434, S44454)
(Consolidated for argument and opinion)

In Banc

On petitions to review ballot title.

Argued and submitted August 26, 1997.

Richard M. Botteri, of Preston Gates & Ellis LLP, Portland, argued the cause and filed the petition for petitioners N. Gregory Hamilton, M.D., et al. With him on the petition was Kelly Cole Zerzan.

Eli D. Stutsman, Portland, argued the cause and filed the petition for petitioners Peter Goodwin, M.D., et al.

Exhibit A

David Schuman, Deputy Attorney General, and Richard D. Wasserman, Assistant Attorney General, Salem, argued the cause for respondent. With them on the answering memoranda was Virginia L. Linder, Solicitor General.

GILLETTE, J.

Ballot title certified. Pursuant to ORAP 1.20(4) and notwithstanding ORAP 11.30(10), this opinion will become effective when the appellate judgment issues. The State Court Administrator shall issue the appellate judgment at 4:00 p.m. on September 5, 1997, unless a petition for reconsideration is both filed with and physically received by the Office of the State Court Administrator by that time. A timely petition for reconsideration will stay issuance of the appellate judgment until the court acts on all timely petitions for reconsideration.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: None

[X] No costs allowed.
[ ] Costs allowed, payable by:
[ ] Costs allowed, to abide the outcome on remand, payable by:

GILLETTE, J.

These are consolidated proceedings for review of a ballot title that the Attorney General has certified to the Secretary of State for a measure that the 1997 Legislative Assembly has referred to the people. That measure, designated by the Secretary of State as "Measure 51," would, if enacted, repeal ORS 127.800 to 127.897, the "Oregon Death with Dignity Act." That Act (hereafter sometimes referred to as "Measure 16") was itself adopted by the people at the November 1994 general election but, due to various court proceedings, never has gone into effect. Petitioners[1] are electors who filed timely written comments with respect to various aspects of the ballot title as it originally was proposed by the Attorney General and who now are entitled to maintain these proceedings. See ORS 250.085(2) (establishing the foregoing criteria for standing to challenge ballot titles certified by the Attorney General).

---

[1] There are two petitions for review of the ballot title and two sets of petitioners. In case #S44434, the petitioners, referred to hereafter as "Hamilton et al.," are Hamilton and Stevens, who are physicians, and Lundquist, Snodgrass, and Sunseri, who are members of the Legislative Assembly. In case #S44454, the petitioners, referred to hereafter as "Goodwin et al.," are Goodwin, a physician, Lee, a lawyer and nurse, and Sinnard. The latter set of petitioners were the principal sponsors of Measure 16.

Pursuant to ORS 250.067(2), the Attorney General has certified to the Secretary of State the following ballot title for the referred measure:

"REPEALS LAW ALLOWING TERMINALLY ILL ADULTS TO OBTAIN LETHAL PRESCRIPTION

"RESULT OF 'YES' VOTE: 'Yes' vote repeals law allowing terminally ill adults to obtain physician's prescription for lethal drugs.

"RESULT OF 'NO' VOTE: 'No' vote retains law allowing terminally ill adults to obtain physician's prescription for lethal drugs.

"SUMMARY: Repeals Measure 16, adopted by voters in 1994. That law:

"Allows terminally ill adult Oregon residents voluntary informed choice to obtain physician's prescription for lethal drugs when physicians predict patient's death within 6 months;

"Requires 15-day waiting period; 2 oral, 1 written request; second physician's opinion; counseling for patients with impaired judgment from depression;

"Gives health care providers immunity from civil, criminal liability for good faith compliance.

"Permits person choice whether to notify next of kin.

"Allows health care providers to refuse to participate."

This court reviews ballot titles certified by the Attorney General to determine whether such titles comply

substantially with the requirements of ORS 250.035(2).[2] ORS 250.085(5). Before turning to those requirements, however, we first must address a procedural point raised by petitioners Hamilton et al.

Petitioners Hamilton et al. argue to this court, as a preliminary matter, that the Attorney General was precluded from preparing a ballot title for the proposed measure, because the Legislative Assembly had itself prepared a ballot title for the measure. See ORS 250.075(1) (providing that, "[w]hen the Legislative Assembly refers a measure to the people, a ballot title for the measure may be prepared by the assembly") (emphasis added). It follows, they argue, that the Attorney General had no authority to prepare a separate, substitute ballot title. See ORS 250.075(2) (providing that, "[i]f the [ballot] title is not prepared under subsection (1) of [ORS 250.075]," the Attorney General shall prepare a ballot title for the referred measure) (emphasis added). From the foregoing, petitioners reason that this court is precluded from reviewing the Attorney General's ballot title, because that ballot title is not eligible to be placed on the ballot at all in any form, i.e., is a

---

[2] The specific requirements for a ballot title under ORS 250.035(2) are identified and discussed later in this opinion.

nullity.

Petitioners acknowledge that A-Engrossed House Bill 3502 (1997 session), the bill that purported to create the legislature's suggested ballot title, was vetoed by the Governor. They assert, however, that the gubernatorial veto also was a nullity, because the Governor is without power to veto legislative bills that are referred to the people. Because this latter theory is pivotal to petitioners' argument, we turn to it.

It is true, as petitioners state, that the Governor does not have the power to veto bills referred to the people by the Legislative Assembly. Oregon Constitution, Article IV, section 1(3)(c).[3] But A-Engrossed House Bill 3502 (1997 session) itself was not, by its own terms, a referred bill. Instead, it was a direction to the Secretary of State to use the election machinery of state government to place before the voters a particular ballot title for a referred bill that had been created in a separate bill, A-Engrossed House Bill 2954 (1997 session).

---

[3] Oregon Constitution, Article IV, section 1(3)(c), provides:

> "A referendum on an Act may be ordered by the Legislative Assembly by law. Notwithstanding section 15b, Article V of this Constitution, bills ordering a referendum and bills on which a referendum is ordered are not subject to veto by the Governor."

As such, A-Engrossed House Bill 3502 (1997 session) was not, as the constitution specifies, a "bill[] ordering a referendum" or a "bill[] on which a referendum is ordered" but was, instead, a bill like any other bill for an Act: It could become law only if a majority of each house of the Legislative Assembly concurred in it, Or Const, Art IV, § 25, and if it was not vetoed by the Governor, Or Const, Art V, § 15b. In the case of A-Engrossed House Bill 3502 (1997 session), however, the Governor chose to exercise his veto power under Oregon Constitution, Article V, section 15b. A-Engrossed House Bill 3502 (1997 session) thus never became law. As of this date, the Legislative Assembly has not overridden his veto pursuant to Oregon Constitution, Article V, section 156(2).

No ballot title having been created by the Legislative Assembly for Measure 51 (i.e., A-Engrossed House Bill 3502 (1997 session) never having become an Act), it fell to the Attorney General to create a ballot title. ORS 250.075(2). The Attorney General did so. The present proceedings are validly before this court. We turn to the merits of the arguments presented by the various petitioners.

As noted, this court reviews ballot titles for "substantial compliance" with the statutory requirements in ORS

250.035. ORS 250.085(5). ORS 250.035(2) provides:

> "The ballot title of any state measure to be initiated or referred shall consist of:
>
> "(a) A caption of not more than 10 words that reasonably identifies the subject matter of the state measure. * * * ;
>
> "(b) A simple and understandable statement of not more than 15 words that describes the result if the state measure is approved. * * *;
>
> "(c) A simple and understandable statement of not more than 15 words that describes the result if the state measure is rejected. * * *;
>
> "(d) A concise and impartial statement of not more than 85 words summarizing the measure and its major effect."

Petitioners Goodwin et al. and Hamilton et al. mount separate challenges to the Caption, Result Statements, and Summary of the certified ballot title. We address each of the three sections of the ballot title in order.

THE CAPTION

Petitioners Goodwin et al. argue that the Caption of the certified ballot title fails to "reasonably identify the subject matter" of Measure 51, as required by ORS 250.035(2)(a), because, instead of focusing on the present measure, it relies too heavily on the ballot title wording certified in 1994 for the then-proposed Measure 16. Specifically, they argue that the

subject matter of Measure 51 would be more readily identifiable if the Caption were to refer, by name and year of passage, to the law that Measure 51 proposes to repeal. They propose a Caption stating: "REPEALS DEATH WITH DIGNITY ACT PASSED BY VOTERS IN 1994."

That argument is not well taken. Assuming that the foregoing would be a permissible Caption, nothing in petitioners' argument demonstrates how the Attorney General's alternative choice for the Caption, viz., "REPEALS LAW ALLOWING TERMINALLY ILL ADULTS TO OBTAIN LETHAL PRESCRIPTION," fails to meet the standard imposed by ORS 250.035(2)(a). The certified Caption reasonably identifies the subject matter of Measure 51 by referring to the content of the corresponding law that it seeks to repeal, using wording previously approved by this court to describe the subject matter. See Kane v. Kulongoski, 318 Or 593, 871 P2d 993 (1994) (issuing certified ballot title for the 1994 initiative; certified Caption read: "ALLOWS TERMINALLY ILL ADULTS TO OBTAIN PRESCRIPTION FOR LETHAL DRUGS").

For similar reasons, the arguments of petitioners Hamilton et al. with respect to the Caption fail. They argue that the certified Caption is inadequate, because it leaves out any reference to "drugs" as the medium through which lethal

prescriptions may be made under the law, in favor of adding the term "adult." They propose that this court substitute the Caption that the legislature proposed in HB 3502 (1997). That Caption states: "REPEALS LAW ALLOWING PRESCRIPTION OF LETHAL DRUGS TO TERMINALLY ILL." By including the term "drugs," petitioners assert, this Caption includes what they deem to be the "most significant" aspect of the law that Measure 51 seeks to repeal, i.e., the right of a physician to write a prescription for lethal drugs.

Petitioners' argument is only an assertion that their preferred wording would be "better" than that used by the Attorney General. That is no basis for this court to hold that the Attorney General's choice is legally insufficient. Moreover, inserting the word "drug" necessarily would require removing the word "adult," in order to meet the 10-word limit on captions. ORS 250.035(2)(a). The gain would not offset the loss: The concept of "drugs" is implied in the word "prescription." On the other hand, removing the word "adult" would deprive the voters of crucial information about who may seek a lethal prescription.

Petitioners have not established that the certified Caption fails to comply substantially with the requirements of ORS 250.035(2)(a).

THE RESULT STATEMENTS

The Attorney General's certified ballot title contains the following Result Statements:

> "RESULTS OF 'YES' VOTE: 'Yes' vote repeals law allowing terminally ill adults to obtain physician's prescription for lethal drugs.
>
> "RESULTS OF 'NO' VOTE: 'No' vote retains law allowing terminally ill adults to obtain physician's prescription for lethal drugs."

Petitioners Goodwin et al. argue, as they did with respect to the Caption, that the Result Statements would be more "simple and understandable," ORS 250.035(2)(b) and (c), if they clearly identified the existing law that Measure 51 seeks to repeal. We reject petitioners' arguments for the same reason expressed earlier concerning petitioners' similar argument with respect to the Caption.

Petitioners Hamilton et al. argue for the following Result Statements:

> "RESULT OF 'YES' VOTE: 'Yes' vote repeals law allowing prescription of lethal drugs for adults diagnosed as terminally ill.
>
> "RESULT OF 'NO' VOTE: 'No' vote retains law allowing prescription of lethal drugs for adults diagnosed as terminally ill."

Petitioners' proposed Result Statements are those that the legislature proposed in HB 3502 (1997 session).

These petitioners assert that the most significant feature of the existing law is that it removes criminal penalties for physicians who prescribe lethal drugs to the terminally ill. Therefore, they reason, their proposed Result Statements properly shift the focus from the choice that the law provides to terminally ill adults to what the law allows physicians to do. Petitioners offer one way to look at the existing law, but their argument fails to show why the certified ballot title, which roughly parallels the 1994 ballot title for Measure 16, does not comply substantially with the requirements of ORS 250.035(2)(b) and (c). Moreover, by maintaining the same focus as the Caption, the certified Result Statements are in accord with this court's case law endorsing internal consistency in ballot titles. See Mabon v. Keisling, 317 Or 406, 414, 856 P2d 1023, (1993) (Question -- statutory predecessor to the Result Statements -- should build on and be consistent with the Caption); Kane, 318 Or at 600 (rewording Caption to make it consistent with the Question and Summary).

THE SUMMARY

The Summary must contain "[a] concise and impartial statement of not more than 85 words summarizing the measure and

its major effect." ORS 250.035(2)(d). In addition to urging that the use of the phrase, "Oregon Death with Dignity Law," in the Summary is essential -- an argument that we reject for the reason already stated -- petitioners Goodwin et al. challenge certain wording of the certified Summary. They argue that the phrase, "Repeals Measure 16, adopted by voters in 1994," is misleading and biased, because the "Death With Dignity Act" no longer is merely a "measure" but, instead, has been transformed into a "law" by the vote of the people. The voters, petitioners assert, are entitled to know that Measure 51 seeks to repeal an existing law.

The Attorney General's certified Summary, although it begins with a reference to "Measure 16," almost immediately thereafter refers to that measure as "[t]hat law." (Emphasis added.) That reference is sufficient, we conclude, to convey to the voters the fact that they are dealing with an existing law.

Petitioners Hamilton et al. reject the entire Summary certified by the Attorney General. They first argue that the certified Summary is unfair, because it informs the voters that Measure 51 would repeal a measure that passed in 1994, thereby making a "political statement" that "encourag[es] voters to vote against Measure 51." We are not persuaded. We agree with the

Attorney General that telling the voters what year the existing law passed is one permissibly useful, neutral method of helping to identify the existing law.

As a fallback position, petitioners argue that the voters at least also deserve to be told that the 1994 initiative passed by a "slim" margin and that the legislature referred the law back to the voters because of its "flaws." Neither of those suggestions is well taken. The margin of passage of Measure 16 is a matter for argument, not for inclusion in an impartial Summary. Still less is it appropriate for a Summary to take sides with respect to a measure by announcing that, in the opinion of some members of the Legislative Assembly, the measure has "flaws."

Petitioners Hamilton et al. next argue that the certified Summary is inadequate, because it improperly focuses on what the 1994 law does, rather than on the "major effect" of Measure 51. The major effect of Measure 51, petitioners assert, is simply to repeal a law; no more needs to be said. They offer the following Summary:

> "SUMMARY: This measure repeals the law that allows terminally ill adults to obtain physician's prescription to commit physician-assisted suicide."

That proposed Summary is the one proposed by the legislature in

HB 3502 (1997 session).

Petitioners' proposed Summary makes no effort to inform the voters of the features of the existing law -- opting to explain only one part (the repeal) of a two-part story (existing law). Even if that would be a permissible way to draw a ballot title in these circumstances -- an issue that we need not and do not address -- petitioners have offered no persuasive explanation as to why the Attorney General's decision to tell both parts of the story fails to comply with the statutory directive to include a Summary containing an impartial statement summarizing the measure's major effect. ORS 250.035(2)(d).

Petitioners Hamilton et al. argue next that the use of the term "residents" in the Summary is improper, because that term is not defined. This court certified a similar use of the term in Kane, the ballot title review case for the 1994 initiative (Measure 16). Petitioners fail even to address, much less explain, why the Kane court erred in using that term.

Petitioners Hamilton et al. rely on federal cases in an attempt to illustrate what they consider to be deficiencies in the certified Summary. They argue first that the reference in the Summary to the standard for criminal and civil immunity is improper, because it has been held unconstitutional. See Lee v.

State of OR, 891 F Supp 1421 (D Or 1995); Lee v. State of OR, 891 F Supp 1429 (D Or 1995) (both so holding). However, the Lee cases were vacated by the Ninth Circuit. Lee v. OR, 107 F3d 1382 (9th Cir 1997). Moreover, and whether or not vacated, such cases have no precedential authority.

Petitioners Hamilton et al. also challenge the use in the Summary of the phrase, "voluntary informed choice," citing the United States Supreme Court's expressed skepticism of such "safeguards" in Washington v. Glucksberg, ___ US ___, ___ S Ct ___, ___ L Ed 2d ___, 65 USL W 4669 (June 24, 1997). Glucksberg is not helpful to the present proceeding. That case addressed the issue of a terminally ill adult's right, under the United States Constitution, to commit physician-assisted suicide, in jurisdictions in which such an act had been declared criminal. Glucksberg does not change the content or meaning of Oregon's existing law.

We conclude that the Attorney General's Summary substantially complies with the requirements of law.

In conclusion, we hold that the ballot title certified by the Attorney General to the Secretary of State is not legally deficient in any respect urged by any of the petitioners before us. Accordingly, we certify the following ballot title for

Measure 51:

REPEALS LAW ALLOWING TERMINALLY ILL ADULTS TO OBTAIN LETHAL PRESCRIPTION

RESULT OF "YES" VOTE: "Yes" vote repeals law allowing terminally ill adults to obtain physician's prescription for lethal drugs.

RESULT OF "NO" VOTE: "No" vote retains law allowing terminally ill adults to obtain physician's prescription for lethal drugs.

SUMMARY: Repeals Measure 16, adopted by voters in 1994. That law:

Allows terminally ill adult Oregon residents voluntary informed choice to obtain physician's prescription for lethal drugs when physicians predict patient's death within 6 months;

Requires 15-day waiting period; 2 oral, 1 written request; second physician's opinion; counseling for patients with impaired judgment from depression;

Gives health care providers immunity from civil, criminal liability for good faith compliance.

Permits person choice whether to notify next of kin.

Allows health care providers to refuse to participate.

Ballot title certified. Pursuant to ORAP 1.20(4) and notwithstanding ORAP 11.30(10), this opinion will become effective when the appellate judgment issues. The State Court Administrator shall issue the appellate judgment at 4:00 p.m. on September 5, 1997, unless a petition for reconsideration is both

filed with and physically received by the Office of the State Court Administrator by that time. A timely petition for reconsideration will stay issuance of the appellate judgment until the court acts on all timely petitions for reconsideration.

DIVISION 007

CONDUCT OF ELECTIONS

Timelines for the November 4, 1997 Special Election by Mail

165-007-0220 (1) The purpose of this rule is to establish the necessary timelines for the Secretary of State and county election officials to conduct a vote-by-mail election and produce a state voters' pamphlet for two statewide measures (House Bill 2954 and Senate Bill 346) referred by the 1997 Legislative Assembly to be voted on at a special election to be held throughout the state on November 4, 1997.

(2) Except where otherwise indicated, "filed" means delivered to and actually received in the office of the Secretary of State, Elections Division, not later than 5:00 p.m. on the designated filing deadline date.

(3) The official timelines for the conduct of the statewide special election on November 4, 1997 shall be as follows:

(a) Written comments concerning a draft ballot title shall be filed not later than five business days after the draft ballot title is filed with the Secretary of State by the Attorney General;

(b) The Attorney General shall file a certified ballot title not later than three business days after the deadline for filing written comments on the draft ballot title;

(c) Any person who timely filed written comments on a draft ballot title, who wishes to appeal the certified ballot title, shall file a petition with the Supreme Court not later than three business days after the Attorney General certifies the ballot title to the Secretary of State;

(d) The Senate President and Speaker of the House shall each appoint one measure proponent to the explanatory statement committee not later than July 24, 1997;

(e) The Secretary of State shall appoint two measure opponents and, if no proponents have been appointed, two proponents, to the explanatory statement committee not later than July 24, 1997;

(f) The four explanatory statement committee members shall appoint a fifth member not later than July 30, 1997;

(g) If the four explanatory statement committee members fail to appoint a fifth member, the Secretary of State shall appoint a fifth member not later than July 31, 1997;

(h) Drafts of the explanatory and financial impact statements shall be filed not later than August 6, 1997;

(i) Public hearings for the draft explanatory and financial impact statements shall be conducted not sooner than August 7, 1997 and not later than August 8, 1997;

(j) The financial impact statement committee shall consider changes and may file revised estimates not later than August 14, 1997;

(k) The Secretary of State shall prepare, certify and file the financial impact statement, if two or more committee members do not approve the committee's estimates, not later than August 15, 1997;

(l) Final explanatory statements shall be filed not later than August 15, 1997;

(m) Legislative Counsel explanatory statements shall be filed not later than

Exhibit B

August 15, 1997;

(n) Any appeal of the explanatory or financial impact statements shall be filed with the Supreme Court not later than August 20, 1997;

(o) Measure arguments to be included in the state voters' pamphlet shall be filed not later than August 26, 1997;

(p) Legislative arguments in support of each measure to be included in the state voters' pamphlet shall be filed not later than August 26, 1997;

(q) The Secretary of State shall certify the official ballot to county election officials not later than 5:00 p.m., September 9, 1997;

(r) County election officials shall mail ballots to long-term absent electors (overseas and military) not later than September 20, 1997;

(s) The state voters' pamphlet shall be delivered to households not sooner than October 8, 1997 and not later than October 11, 1997.

(t) County election officials shall mail ballots to other than long-term absent electors not sooner than October 15, 1997 and not later than October 17, 1997.

Statutory Authority: ORS 246.120, 246.150, House Bill 3742 (1997 Legislative Assembly)

Stats. Implemented: ORS 250.127, 251.205, 251.215, 251.225, 251.235, 251.245, House Bill 3742 (1997 Legislative Assembly)